

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Joint Petition for Expedited Rulemaking)	RM-10865
Concerning the Communications Assistance for)	
Law Enforcement Act)	

**NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION
INITIAL COMMENTS**

The National Telecommunications Cooperative Association (NTCA)¹ submits these comments in response to the Commission’s Public Notice dated March 12, 2004 seeking comment on the above referenced Joint Petition for Rulemaking (Petition). NTCA agrees with petitioners that there are outstanding issues related to the Communications Assistance for Law Enforcement Act (CALEA) that require clarification. However, the Commission should take care to not impose new regulations or deadlines without considering the operating realities of small, rural carriers. NTCA also agrees with petitioners that it is imperative carriers be permitted to recover their CALEA implementation costs. NTCA does not agree with petitioners’ proposal that all carriers recover their costs from their customers. End user cost recovery will place a

¹ NTCA is the premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents more than 560 rural rate-of-return regulated telecommunications providers. All of NTCA’s members are full service incumbent local exchange carriers (ILECs) and many of its members provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a “rural telephone company” as defined in the Communications Act of 1934, as amended (Act). NTCA’s members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities

disproportionate burden on small, rural carriers and their customers. The Commission should consider alternative cost recovery mechanisms for small carriers.²

I. ARBITRARY DEADLINES AND BENCHMARKS MAY ULTIMATELY HINDER CALEA COMPLIANCE IN RURAL AREAS

The petitioners raise several issues in their petition that have been a source of confusion for all parties involved in CALEA implementation. It is often difficult for carriers to know whether they are covered by CALEA's mandates and if they are, which services they provide must be CALEA capable. NTCA agrees with law enforcement that there needs to be some certainty so that carriers do not inadvertently violate the law. However, forcing carriers to comply with arbitrary deadlines and benchmarks, as proposed by petitioners, may not result in CALEA compliance.

Petitioners compare CALEA compliance with E911 compliance and ask the Commission to impose similar milestones, benchmarks and penalties for non-compliance. Petitioners argue that this "rigorous approach proved highly successful" in facilitating full implementation of E911 in a timely manner. While there may be some truth in that statement as applied to large carriers, E911 implementation rules have been a disaster for many rural wireless carriers.

The E911 deadlines and benchmarks were adopted without full consideration of the realities of rural America and the carriers that serve it. The technology and system architecture of rural systems made it impossible for some rural carriers to comply in a timely manner. Rural carriers were left at the mercy of the manufacturers and the decisions of the large carriers. Rural carriers have been forced to spend precious

² NTCA's failure to comment on the other aspects of the Petition should not be construed as agreement with Petitioners. NTCA will comment on the proposals if the Commission puts them out as part of a Notice of Proposed Rulemaking.

resources filing for extensions or changing out entire systems to be E911 capable. Very often, these resources would have been put to better use by building additional towers. E911 is useless in areas where there is no signal. The ability to make any call in an emergency was sacrificed for the ability to make an E911 call from areas where basic service was already available. The public would have been better served if the Commission had adopted a different E911 compliance approach for small, rural carriers.

Benchmarks, deadlines and strict penalties are not appropriate in all circumstances. It is nonsensical to force rural carriers to spend the resources to file for extensions when they have no access to compliant technology and no market power to influence the manufacturers' decisions to develop technology. The Commission must also keep in mind that small carriers are at the bottom of the list when upgrades are scheduled. Manufacturers serve their more profitable large clients first. Rather than forcing hundreds of rural carriers to file cyclical requests for extensions, the Commission should set realistic goals after the technology is available and let rural carriers get to the business of running their company and upgrading their services.

The Regulatory Flexibility Act also requires that the Commission consider alternative compliance measures for small businesses. The Commission should always do a cost-benefit analysis before imposing new regulation or deadlines on the small carriers. A rigorous compliance approach may hasten CALEA compliance in urban areas, but may do a disservice to consumers served by rural carriers.

II. RURAL CARRIERS SHOULD BE PERMITTED TO RECOVER THEIR CALEA RELATED IMPLEMENTATION COSTS FROM A SOURCE OTHER THAN THEIR END USERS

Petitioners asks that the Commission establish rules that (1) confirm that carriers bear the sole financial responsibility for development and implementation of CALEA solutions for post-January 1, 1995 communications equipment, facilities, and services³ and (2) permit carriers to recover from their customers the costs of development and implementing CALEA intercept solutions in post-January 1, 1995 equipment, facilities, and services.⁴

NTCA agrees with petitioners that carriers must have a way to recover their portion of the CALEA implementation costs. However, an end user surcharge will disproportionately affect the consumers living and working in rural America and the carriers that serve them. Many of the costs associated with governmental mandates are the same irrespective of the size of the company implementing them. The cost of many switch and software upgrades do not vary no matter how many customers are served by that switch or software.⁵ Large companies have hundreds of thousands of customers over which to spread the cost. Conversely, a small company may have a few hundred. The average NTCA member-company serves less than 6,000 access lines. If you exclude the 20 members with more than 20,000 lines, the average company has 3,800 subscribers. NTCA's smallest member company serves just 99 access lines. An end-user charge for

³ Petitioners state that CALEA "clearly places the CALEA solution implementation costs . . . on carriers, not law enforcement" and asks the Commission to establish a rule to so specifically state. However, without agreeing with that statement, NTCA submits that if the obligation is, in fact, so clear under the law, such a rule is unnecessary and duplicative.

⁴ Petition, p. 63.

⁵ Examples of the disproportionate effect of end user charges on rural consumers can be found in the state proceedings on the implementation of the Wireless Local Number Portability rules.

an upgrade that costs \$100,000 will vary greatly depending on whether the company serves 250,000 subscribers or 250 subscribers.

If the Commission does adopt a Notice of Proposed Rulemaking in response to Petitioners' request, it must prepare an Initial Regulatory Flexibility Analysis to comply with the Regulatory Flexibility Act.⁶ Under the RFA, this analysis is required to examine and identify the impact of the rulemaking on small businesses, and discuss possible alternatives that may achieve the objective in a less burdensome way.

While the Commission may conclude that an end user charge is appropriate for large carriers, it would be more appropriate for rural carriers to recover their costs in the interstate jurisdiction.

III. CONCLUSION

If the Commission agrees that the subject of the petition at issue is appropriately addressed through a new and separate rulemaking proceeding, it must simultaneously consider the special needs and realities of carriers serving rural America. Strict, arbitrary benchmarks and stiff penalties may not go far in accomplishing CALEA's goals and may only lead to more extension requests and paperwork for the carriers and the FCC. The Commission should instead work with the carriers and manufacturers to set a realistic and flexible timetable for implementation.

⁶ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. § 601 *et seq.*) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 USC § 612(a).

CALEA implementation comes with significant costs for carriers and while carriers must have a means to recover those costs, NTCA does not agree that an end-user charge is appropriate for rural carriers. An end-user charge will disproportionately harm small carriers and their customers.

Respectfully submitted,

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April 12, 2004

CERTIFICATE OF SERVICE

I, Rita H. Bolden, certify that a copy of the foregoing Initial Comments of the National Telecommunications Cooperative Association in RM-10865, DA 04-700 was served on this 12th day of April 2004 by first-class, U.S. Mail, postage prepaid, to the following persons listed below:

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